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In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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86 pp

QUESTION PRESENTED

Whether the Board reasonably concluded that all bargaining unit employees, not just union members, must be afforded an opportunity to vote on the affiliation of their bargaining representative with an international union before the newly affiliated union has a right to continued recognition as the unit employees' exclusive bargaining representative.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption of the case in this Court, Seattle-First National Bank—respondent before the Board—intervened in the court of appeals and is accordingly a respondent in this Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 752 F.2d 356. The decisions and orders of the National Labor Relations Board (App., *infra*, 27a, 34a, 45a) are reported at 241 N.L.R.B. 751, 245 N.L.R.B. 700, and 265 N.L.R.B. 426.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 59a) was entered on August 2, 1984. A petition for rehearing was denied on December 26, 1984. (App., *infra*, 60a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at App., *infra*, 65a.

STATEMENT

1. The Firstbank Independent Employees Association (FIEA or the Union) was certified in 1970 as the exclusive bargaining representative of a unit consisting of the employees of Seattle-First National Bank (the Bank) in the State of Washington (App., *infra*, 27a). In 1977 the FIEA executive council decided to seek affiliation with the Retail Clerks International Union, and the union scheduled an affiliation election for February 1978. Prior to the election, all bargaining unit employees were informed of the proposed affiliation and told that only those who were FIEA members as of January 19, 1978, would be eligible to vote. App., *infra*, 28a-29a. At the time of the election, 2624 of the 4800 unit employees were FIEA members; 1206 voted for affiliation and 774 voted against (App., *infra*, 29a). FIEA was thereafter chartered by the international union as Financial Institution Employees of America, Local 1182, and the Union filed a petition with the Board, pursuant to Section 102.60(b) of the Board's Rules, 29 C.F.R. 102.60(b), seeking amendment of its certification to reflect its affiliation.[1]

2. The Board initially granted the amendment, rejecting the Bank's contentions that the affiliation vote was invalid because only FIEA members were allowed

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[1] After the certification proceedings before the Board, the Retail Clerks merged with the Amalgamated Meat Cutters and Butcher Workmen of North America to form the United Food and Commercial Workers International Union (UFCW), and the affiliated local's designation changed accordingly (App., *infra*, 2a). No issue concerning that merger is presented here.

to vote, and that the affiliation represented a substantial change in the certified bargaining representative which raised a doubt concerning the Union's continuing majority status that only a Board-conducted election could resolve. The Board relied on its then-recent decision in *Amoco Production Co. (Amoco III)*, 239 N.L.R.B. 1195 (1979), in which the Board had held that the affiliation of an independent union with an international union was an internal union matter on which nonmembers were not entitled to vote and that it did not provide a reason for doubting the union's continued majority status. App., *infra*, 30a-32a.

3. The Bank subsequently refused to recognize and bargain with the Union. Declining to reconsider its certification decision, the Board found that the Bank violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and ordered the Bank to recognize and bargain with Local 1182. App., *infra*, 34a-42a.

The Bank petitioned for review of the Board's order in the Ninth Circuit and the Board cross-applied for enforcement. While the case was pending, the Fifth Circuit remanded the Board's decision in *Amoco III* for a statement of facts supporting the Board's conclusion in that case that there was substantial continuity between the pre- and post-affiliation labor organizations (*Amoco Production Co.* v. *NLRB*, 613 F.2d 107, 111-112 (5th Cir. 1980)). The Board requested remand of the instant case on the ground that it was analytically dependent on *Amoco III*, and the court of appeals granted the Board's request on June 27, 1980. App., *infra*, 3a.

4. On remand in the *Amoco* case, the Board, reversing its earlier position, concluded that affiliation is not a purely internal union matter but affects the right of all bargaining unit employees to choose their exclusive bargaining representative; thus, all unit employees

must be allowed to vote on the affiliation. *Amoco Production Co. (Amoco IV)*, 262 N.L.R.B. 1240 (1982) (App., *infra*, 49a, 52a-54a).[2] The Board added that absent a unit-wide vote, it would not reach the issue of whether there was sufficient similarity between the old and newly affiliated union so that the latter could be deemed a continuation of the former (App., *infra*, 51a-52a).

With respect to the requirement that all unit employees be permitted to vote, the Board in *Amoco IV* explained that it is "basic to the collective-bargaining process that the selection of a bargaining representative be made by the employees in the bargaining unit" (App., *infra*, 53a). The Board added that it was insufficient merely to afford unit members an opportunity to join the union and thereby participate in the affiliation vote—as *Amoco III* had done—because "Section 7 of the Act * * * gives employees the choice * * * to refrain from engaging in [union] activities" (App., *infra*, 53a-54a).

On the basis of its decision in *Amoco IV*, the Board held that the affiliation election in the instant case was inadequate to justify amending the FIEA certification, and ordered that both the Union's certification petition and the refusal to bargain complaint against the Bank be dismissed (App., *infra*, 45a-48a).

5. Upon the Union's petition for review, the court of appeals, with Judge Wright dissenting, concluded that the Board's *Amoco IV* rule that all bargaining unit employees are entitled to vote in a union affiliation election was "irrational" and "inconsistent with * * * long-

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[2] The Fifth Circuit subsequently upheld the Board's decision in *Amoco IV*. *Local No. 4-14, Oil Workers Int'l Union* v. *NLRB*, 721 F.2d 150 (1983).

standing federal labor policy" (App., *infra*, 10a). It thus remanded the case to the Board for further proceedings.

The court found that "three reasons compel[led its] conclusion": (1) the new rule "is inconsistent with the longstanding federal labor policy * * * to avoid unnecessary interference in internal union affairs"; (2) the rule "is inconsistent with the strong national labor policy of maintaining stability in the bargaining representative"; and (3) the rule is "irrational because the Board's existing * * * procedures adequately protect employee rights without imposing on union members' rights or otherwise being inconsistent with the [Act]" (App., *infra*, 10a-11a, 16a).

The court found that the new rule unjustifiably interferes with the union's internal decision to affiliate because it "mandates that a continuity determination may not be conducted until after a unit-wide vote is taken." In the court's view "[t]his puts the cart before the horse" because the "interference" resulting from requiring such a unit-wide vote could be justified "[o]nly *after*" the Board finds an absence of continuity between the pre- and post-affiliation union. App., *infra*, 16a.

The court further found that the Board's new rule "runs completely counter to the policy of promoting stability in the bargaining representative." The court's theory was that by allowing an employer to refuse to bargain with a post-affiliation union in the absence of a unit-wide vote, the Board "effectively decertifies [the] union before the Board can establish any basis for a union's loss of majority status." App., *infra* 19a.

Finally, the court found that the new rule was "irrational" because it concluded that the Board's previously followed "due process" and "continuity" procedures were adequate to protect the rights of union members and employees. In the court's view, the existing "due process" requirement—which permitted the affiliation

vote to be restricted to union members but which required that vote to be conducted in accord with minimum democratic guarantees—was designed, and in fact was adequate, to protect the rights of union members. And the "continuity requirement" was adequate to protect the rights of all bargaining unit employees (both union members and nonmembers) by requiring sufficient similarity between the pre- and post-affiliation unions to insure that a majority of the bargaining unit continued to desire representation by the post-affiliation union. App., *infra*, 19a-21a.

Judge Wright, in dissent, noted that the Fifth Circuit had enforced the Board's order in *Amoco IV*, and agreed with that court that the new rule was a rational interpretation of the Act and within the Board's expertise and discretion in establishing procedures to ensure the fair and free choice of a bargaining representative by all employees (App., *infra*, 24a-25a). He stated that, by reaching the opposite conclusion, the majority "engage[d] in the balancing of interests that is the province of the Board, not the courts" (*id.* at 25a).

The court denied the Bank's petition for rehearing and suggestion for rehearing en banc, although six judges dissented from the denial of en banc rehearing (App., *infra*, 60a-62a).

REASONS FOR GRANTING THE PETITION

1. The decision of the Ninth Circuit rejecting the Board's requirement that all bargaining unit employees be allowed to vote on an affiliation of their bargaining representative with an international union, as a precondition of the newly affiliated union's right to continued recognition, is in direct conflict with the decision of the Fifth Circuit in *Local No. 4-14, Oil Workers Int'l Union* v. *NLRB (Oil Workers)*, 721 F.2d 150 (1983). There, the court concluded that the Board's requirement was not "irrational or inconsistent with the Act,

[and was not] beyond the wide discretion of the Board to establish procedures in an affiliation election that will ensure the fair and free choice of the bargaining representative of all the employees" (721 F.2d at 153). The conflict between the Fifth and Ninth Circuits concerns an important and recurring question in the administration of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*[3] Accordingly, it is appropriate for this Court to settle the issue.

2. a. Section 7 of the Act, 29 U.S.C. 157, guarantees employees the right "to bargain collectively through representatives of their own choosing." Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), implements this right by requiring an employer to bargain in good faith with the representative of its employees, as defined in Section 9(a), 29 U.S.C. 159(a), which confers exclusive rep-

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[3] Union mergers and affiliations are a common occurrence, and in recent years the pace of such activities has accelerated. See Adams, *Labor Organization Mergers 1979-84: Adapting to Change*, 107 Monthly Lab. Rev., Sept. 1984, at 21-27; see also *Report of AFL-CIO Committee on the Evolution of Work on the Changing Situation of Workers and Their Unions, reprinted in* Daily Lab. Rep. (BNA) No. 37, at D-1, D-7 (Feb. 25, 1985) Moreover, the questions of voter eligibility and whether merger or affiliation elections reliably reflect the sentiments of unit employees arise frequently before the Board and the courts of appeals. See, *e.g.*, *NLRB* v. *Commercial Letter, Inc.*, 496 F.2d 35, 42 (8th Cir. 1974); *NLRB* v. *Pearl Bookbinding Co.*, 517 F.2d 1108, 1111-1112 (1st Cir. 1975); *St. Vincent Hospital*, 238 N.L.R.B. 1525, 1526, 1527 (1978), enforced, 621 F.2d 1054, 1059 (10th Cir. 1980); *Ocean Systems, Inc.*, 223 N.L.R.B. 857, 859-860 (1976), enforced *sub nom. J. Ray McDermott & Co.* v. *NLRB*, 571 F.2d 850, 856 (5th Cir.), cert. denied, 439 U.S. 893 (1978); *Newspapers, Inc.*, 210 N.L.R.B. 8, 9 n.3, 10 n.13 (1974), enforced, 515 F.2d 334, 338 n.11 (5th Cir. 1975); *Harris-Woodson Co.*, 85 N.L.R.B. 1215, 1216-1217 (1949), enforced, 179 F.2d 720, 722 (4th Cir. 1950); *Jasper Seating Co.*, 231 N.L.R.B. 1025, 1026 (1977); *Montgomery Ward & Co.*, 188 N.L.R.B. 551, 553 n.5 (1971); *Equipment Mfg., Inc.*, 174 N.L.R.B. 419, 420 n.5 (1969); *North Electric Co.*, 165 N.L.R.B. 942, 943-944 (1967).

resentative status upon the union selected by a majority of the employees in an appropriate bargaining unit. In administering these provisions the Board must determine the conditions under which a union maintains its status as statutory bargaining representative despite changes in its organization and structure, such as affiliation with an international union. *Retail Clerks Local 428* v. *NLRB*, 528 F.2d 1225, 1227 (9th Cir. 1975). The Board faces this issue both in representation cases where the newly affiliated organization requests amendment of the certification issued to the pre-affiliation union, and in unfair labor practice cases where the employer refuses to recognize the newly affiliated organization as the statutory representative of its employees. The Board's concern is to insure that the organizational change reflected the desires of the employees in the bargaining unit and did not so alter the statutory representative that it could no longer be considered a continuation of the old union.

Thus, the Board has long held that union affiliation votes must satisfy minimum democratic standards, called "due process" requirements, in order to insure that the vote accurately represents the desires of affected employees. Prior to *Amoco IV*, *supra*, however, the Board accepted an affiliation vote open only to union members as sufficient to indicate the desires of the unit as a whole, provided that nonmembers were free, if they chose, to join the union and participate in the election and the deliberations that preceded it.[4] In *Amoco IV*, the Board concluded that this procedure

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[4] In *Amoco III*, 239 N.L.R.B. at 1195 n.3, the Board reversed *Jasper Seating Co.*, 231 N.L.R.B. 1025, 1026 (1977), in which the Board refused to recognize an affiliation where nonunion unit employees were not allowed to vote in the affiliation election. *Jasper Seating*, in turn, reversed the Board's previous policy that due process did not require that nonmembers vote in affiliation elections. See, *e.g.*, *Bear Archery*, 223 N.L.R.B. 1169 (1976), enforcement denied, 587 F.2d 812 (6th. Cir. 1977).

was insufficient to assure that the affiliation vote reliably indicated the sentiments of the unit as a whole, and that it unduly infringed on the Section 7 rights of nonmembers by requiring them to join the union before they could vote on the change in their statutory representative. Accordingly, the Board ruled that all bargaining unit employees, regardless of union membership, must be afforded an opportunity to consent to the change before the newly affiliated entity has a right to continued recognition as the unit employee's exclusive bargaining representative.[5]

Even when the bargaining unit employees have approved the affiliation in a unit-wide vote, however, the Board will not enter a bargaining order or amend a certification if it finds that the structural changes have resulted in a completely new entity.[6] For, while " '[t]he industrial stability sought by the Act would unnecessarily be disrupted if every union organizational adjustment were to result in displacement of the employer-bargaining representative relationship' " (*NLRB* v.

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[5] The Board also applies its *Amoco IV* rule where two local unions of the same international union merge (*F.W. Woolworth Co.*, 268 N.L.R.B. 805 (1984), petition for review pending, *United Food & Commercial Workers Local 568* v. *NLRB*, No. 84-1243 (D.C. Cir.)), or where a local union splits into two separate unions (*1820 Central Park Ave. Restaurant Corp.*, 116 L.R.R.M. 1393 (1984)).

[6] Determination of the question whether the newly-affiliated union is a new entity depends on such factors as: and whether the union continues to administer the contracts to which it is a party; whether it has retained its old officers; whether there is any change in its autonomy regarding such matters as contract negotiations, strikes, and grievances. See, *e.g.*, *J. Ray McDermott & Co.* v. *NLRB*, 571 F.2d 850, 855-857 (5th Cir. 1978); *NLRB* v. *Pearl Bookbinding Co.*, 517 F.2d 1108, 1111-1112 (1st Cir. 1975); *NLRB* v. *Commercial Letter, Inc.*, 496 F.2d 35, 39-40 (8th Cir. 1974); *Retail Clerks Local 428* v. *NLRB*, 528 F.2d 1225, 1227 (9th Cir. 1975). Compare *American Bridge Div.* v. *NLRB*, 457 F.2d 660, 663-664 (3d Cir. 1972).

Newspapers, Inc., 515 F.2d 334, 338 (5th Cir. 1975), quoting *Canton Sign Co.*, 174 N.L.R.B. 906, 908-909 (1969), enforcement denied on other grounds, 457 F.2d 832 (6th Cir. 1972)), it would be equally disruptive to allow the ready substitution of an entirely new representative. See *Independent Drug Store Owners*, 211 N.L.R.B. 701 (1974), aff'd *sub nom. Retail Clerks Local 428* v. *NLRB*, *supra*; *Gulf Oil Corp.*, 135 N.L.R.B. 184 (1962).

b. The Board's requirement that all bargaining unit employees, not just union members, be allowed to vote on the question of the affiliation of their bargaining representative with an international union, as a precondition of the newly affiliated union's right to continued recognition, constitutes a reasonable and principled construction of the Act, as the Fifth Circuit in *Oil Workers*, *supra*, and the dissenting judge on the panel below recognized.

A change in affiliation is not purely an internal union affair, because it can affect the union's capacity to represent the bargaining unit. Since the union is obligated to represent all of the employees in the unit, nonunion as well as union (see *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967)), the change is of importance to the entire bargaining unit. As the Board pointed out in *Amoco IV* (App., *infra*, 53a), "it is inconsistent to permit all unit employees to vote in a representation election, but when the question is one of affiliation with another union, to permit only union members the right to vote." Moreover, the Board reasonably concluded that the option that *Amoco III* afforded nonunion members of the unit—the opportunity to join the union and thus participate in the election—"shut[s] one's eyes to Section 7 of the Act," which "clearly gives employees the choice of participating in union activities or * * * refrain[ing] from engaging in those activities" (App., *infra*, 53a-54a).

The new rule, insofar as it "mandates that a continuity determination may not be conducted until after a unit-wide vote is taken," does not, as the court below asserted, "put[ ] the cart before the horse" (App., *infra*, 16a). That assertion is based on the premise that a change in the union's structure or organization is an internal union matter, unless it is substantial enough to create a new entity and thus raise a question concerning representation that could invoke the Board's election machinery. This premise is erroneous; the Board reasonably concluded that, even where the change is not substantial enough to create a new entity, a union organizational change—specifically, a change in affiliation—may so affect the union's representation of the bargaining unit that all of the employees in the unit have a legitimate interest in voting on the change.

Nor, contrary to the view of the court below, is the Board's new rule "unreasonably duplicative" (App., *infra*, 22a). As the court notes, it is possible that even after a majority of the unit employees have approved the affiliation in a union-conducted vote, "the Board would nonetheless call a formal unit-wide representation election if the Board found that the post-affiliation union was substantially different from the pre-affiliation union" (*ibid.*). But where there is a lack of continuity, a Board-conducted election is not simply another method of determining whether a majority of the unit employees want to be represented by the new entity. Rather, where the new entity is substantially different from the old entity, the old bargaining relationship has been so altered that the Board is justified in treating the situation as comparable to an initial recognition situation wherein the employer—even though it may have no reason for doubting the union's majority status—is entitled to have the representation question determined in a Board-conducted election, in which it

will have an opportunity to express its views to the employees. See *Linden Lumber Div.* v. *NLRB*, 419 U.S. 301, 305-310 (1974) (employer that has not engaged in unfair labor practices impairing the electoral process may properly refuse to accept evidence of the union's majority status other than the results of a Board election).

3. The court below departed from established principles of judicial review in failing to sustain the rule enunciated by the Board in *Amoco IV*. The Board's construction of the Act is entitled to deference by the reviewing court where, as here, it "is reasonably defensible." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979). Accord: *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S. 404, 413 (1982); *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 501 (1978); *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975). Such deference is particularly appropriate where, as here, the Board is exercising its broad "discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees" (*NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946)).

Nor is the Board's new rule entitled to less deference simply because it constitutes a change from previous policy. As this Court recently observed in *NLRB* v. *Action Automotive, Inc.*, No. 83-1416 (Feb. 19, 1985), slip op. 4 n.4: "[t]he Board's policy is not undermined by the fact that it has modified and refined its position; an agency's day-to-day experience with problems is bound to lead to adjustments." In short, "[a]n administrative agency is not disqualified from changing its mind" (*NLRB* v. *Local 103, Iron Workers*, 434 U.S. 335, 351 (1978)). When it does so, it is not the task of the reviewing court to construe the statute de novo; instead, the court must decide whether "the Board has reached

a fair and reasoned balance upon a question within its special competence," and whether, in reaching "its newly arrived at construction" of the Act, "the Board has adequately explicated the basis of its interpretation." *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. at 267. Accord: *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 492 (1947). The Board has done so here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-7736

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

AND

SEATTLE-FIRST NATIONAL BANK, INTERVENOR.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

ARGUED AND SUBMITTED SEPTEMBER 7, 1983

[Filed Aug. 2, 1984]

OPINION

Before: WRIGHT, PREGERSON, and FERGUSON, *Circuit Judges.*

PREGERSON, *Circuit Judge:*

The National Labor Relations Board now requires that non-union employees participate in a certified union's internal decision to affiliate with another labor organization before the Board will amend the newly-affiliated union's certification as the unit's exclusive bargaining representative. The question before us is whether the new rule is rational and consistent with the National Labor Relations Act (NLRA). Because the

rule fails this test, we grant the union's petition for review and reject the rule.

PROCEDURAL BACKGROUND

A. Affiliation Decisions and the Board's New Rule

In this case, an independent, Board-certified union of bank employees, Firstbank Independent Employees Association, voted to affiliate with the Retail Clerks Union (Retail Clerks). In accordance with the independent union's constitution, only union members voted in the affiliation election. Upon a vote favoring affiliation, the union changed its name to Financial Institution Employees of America, Local 1182, chartered by the Retail Clerk's International Union, AFL-CIO.[1] The Board determined that the affiliation did not substantially change the character of the union. *Seattle-First National Bank*, 241 N.L.R.B. 751 (1979). The Board then amended the independent union's certification as the exclusive bargaining representative of the bank's employees to designate the newly-affiliated union as the independent's successor. *Id.* When the employer, Seattle-First National Bank, refused to bargain with the newly-affiliated union, the Board found the Bank guilty of an unfair labor practice and ordered it to bargain. *Financial Institution Employees of America*, 245 N.L.R.B. 700 (1979).

In reaching its decision to amend the union's certification, the Board followed its established practice of conducting "due process" and "continuity" determinations.[2] A "continuity" finding between a pre- and

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[1] After the Board amended the union's certification, the Retail Clerks merged with the Amalgamated Meat Cutters and Butcher Workmen of North America to become the United Food and Commercial Workers International Union, AFL-CIO. The Board accepted this change.

[2] "Due process" in the context of the Board's review of affiliation decisions is discussed *infra* pp. 8-9, 22-23, and note 6. "Continuity"

post-affiliation union has traditionally been the prerequisite for the Board's amendment of a union's certification. In this case, the Board found continuity between the pre- and post-affiliation union. 241 N.L.R.B. at 752. In amending the union's certification and ordering the Bank to bargain, the Board specifically relied upon a contemporaneous case, *Amoco Production Co. (Amoco III)*, 239 N.L.R.B. 1195 (1979), in which the Board found continuity despite the fact that non-union members had not been allowed to vote on the affiliation question. In *Amoco III*, the Board stressed that affiliation elections are internal union matters; thus, the Board did not require non-union employees to participate in those elections. Amoco Production Company appealed *Amoco III* to the Fifth Circuit; Seattle-First National Bank appealed the instant case to this circuit.

The Fifth Circuit remanded *Amoco III* to the Board for a statement of facts supporting the Board's affirmative continuity determination. *Amoco Production Co.* v. *NLRB*, 613 F.2d 107, 112 (5th Cir. 1980). The Board's opinion had failed to set out those facts and the court could not determine whether the Board's continuity finding was supported by substantial evidence. *Id.* After the Fifth Circuit's remand, the Board asked us to remand as well because our case was analytically linked to *Amoco III*. We complied. *Seattle-First National Bank* v. *NLRB*, Nos. 80-7004, 79-7515 (9th Cir. June 27, 1980) (order granting Board's motion for remand).

On remand from the Fifth Circuit, the Board, by a 3-2 vote, overruled *Amoco III* and concluded, in *Amoco Production Co. (Amoco IV)*, 262 N.L.R.B. 1240 (1982), that affiliation decisions were *not* internal union matters. The Board held that a unit-wide vote on affiliation

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means that the union, even though newly affiliated with another labor organization, is essentially the same union that the Board originally certified to represent the bargaining unit. *See infra* pp. 9-11 (describing the continuity determination process).

was a necessary prerequisite to obtaining an amended certificate showing the new affiliate as the successor bargaining representative. The Board declared that "due process" required a unit-wide vote and because a unit-wide vote had not been taken, the Board did not reach the continuity issue. The Board then revoked its earlier amendment of the union's certification and dismissed the unfair labor practice complaint against the employer, which had been based on the employer's repudiation of the existing contract and refusal to bargain. The union appealed the Board's *Amoco IV* decision to the Fifth Circuit.

Similarly, the Board, by a 3-2 vote, changed its earlier opinion in our case and followed *Amoco IV*. The Board's opinion states that excluding nonmembers from voting in affiliation decisions violates "fundamental due process standards." *Seattle-First National Bank*, 265 N.L.R.B. No. 55, slip op. at 3 (Nov. 18, 1982). The board revoked the newly-affiliated union's amended certification and dismissed the previously-granted refusal to bargain/unfair labor practice charge against the bank. The Board did not reconsider whether continuity existed between the pre- and post-affiliation union. The union petitioned for review.

In the *Amoco IV* appeal, the Fifth Circuit affirmed the Board's new ruling after acknowledging the existence of "strong arguments to the contrary." *Local Union No. 4-14* v. *NLRB*, 721 F.2d 150, 152-53 (5th Cir. 1983). In a brief opinion, the court deferred to the Board, explaining, "we are unable to say that the general ruling that now requires the participation of non-union members in an affiliation election is irrational or inconsistent with the Act...." *Id.*

B. Effect of the Board's New Rule

Unless a union puts an affiliation decision to a vote of all employees in the bargaining unit, the Board will not consider whether sufficient continuity exists between a

pre- and post-affiliation union to justify amending the union's certification. Generally, the Board will not enforce an employer's duty to bargain in good faith under § 8(a)(5) of the National Labor Relations Act, 28 U.S.C. § 158(a)(5) (1982), unless the newly-affiliated union has had its certificate amended. This means that under the Board's new rule an employer may, with impunity, refuse to bargain with any union that affiliates without permitting non-union employees to participate in what until recently was considered an internal union affair. In effect, the Board now requires that *all* union affiliation decisions be put to a vote of all employees, union and non-union, in the bargaining unit.[3]

The Board changed the rule because it now believes that affiliation is not an internal union matter. Instead, the Board suggests that affiliation by its very nature implicates the guaranteed rights of all employees to a bargaining representative selected by the majority. Under the Board's new approach, an affiliation decision will always call a union's continuing majority status into question.

STANDARD OF REVIEW

The Board's decision in this case announces an altered interpretation of the National Labor Relations Act.[4] In reviewing such decisions, we accord the

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[3] See, for example, *Amoco IV*, in which the board refused to amend the union's certification because non-union employees were not allowed to vote in an affiliation decision. There, even if all non-union employees had voted and all of them had voted against affiliation the unit as a whole would have approved the affiliation.

[4] The Bank and the amicus U.S. Chamber of Commerce discuss extensively the factual merits of the union's actual continuity. If we grant the union's petition, the Bank suggests that we should deny the union amended certification because of the substantial lack of continuity between the pre- and post-affiliation union. The Chamber of Commerce, on the other hand, suggests that we should consider the factual merits first, and therefore need not re-

Board's interpretation substantial deference and review the decision for "rationality and consistency with the Act." *NLRB* v. *Nevis Industries, Inc.*, 647 F.2d 905, 909 (9th Cir. 1981); *see Ford Motor Co.* v. *NLRB*, 441 U.S. 494, 497 (1979); *Machinists Local 1327* v. *NLRB*, 725 F.2d 1212 (9th Cir. 1984). Therefore, we will uphold the new rule if it is rational and consistent with the NLRA, and we will reject the rule if it is not.

DISCUSSION

A. Background: Certification, Affiliation, and Continuity Decisions

Section 7 of the NLRA guarantees employees the right "to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157 (1982). Section 9(a) of the NLRA mandates that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees ... shall be the exclusive representatives" of the unit's employees. 29 U.S.C. § 159(a) (1982). Once the Board is satisfied that a union is the chosen representative of a

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view the rule because the post-affiliation union allegedly differs substantially from the pre-affiliation union. We are unable to comply with either request. When the Board, in the wake of the Fifth Circuit's remand of *Amoco III*, asked us to remand the case in which the Board considered the continuity factors, we complied. Thus, we are without power to consider the factual continuity question because such determinations are the province of the Board, subject only to our review to ensure that those decisions are based on "substantial evidence." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951); *Retail Store Employees Local 428* v. *NLRB*, 528 F.2d 1225, 1227 (9th Cir. 1975).

The union also asks us to consider the factual merits and then to reinstate the Board's prior continuity finding, the earlier amended certification, and the unfair labor practice finding against the Bank. As we have just explained, the case in which the continuity decision favorable to the union was made is no longer before us. The case before us involves only the Board's new rule. *See also infra* note 16.

unit's employees in accordance with § 7,[5] the Board will certify the union as the unit's exclusive bargaining representative under § 9(a). A union seeks certification as the exclusive bargaining representative for many reasons, not the least of which is to gain the NLRA's protection if the employer commits an unfair labor practice. *See, e.g.*, 1 C. Morris, *The Developing Labor Law* 341 (2d ed. 1983).

Under certain circumstances, a certified bargaining representative may lose substantial support within the union or the unit as a whole. When this happens, the employees, whether union or non-union, may ordinarily petition the Board to decertify the union. 29 C.F.R. § 101.17 (1983). If, after investigating the petition, the Board determines that "a question of representation" exists, the Board must hold a hearing to decide whether the union should continue to represent the unit. NLRA § 9(c)(1)(A)(ii), 29 U.S.C. § 159(a)(1)(A)(ii) (1982). At least 30% of the unit's employees' must support the decertification petition before the Board will hold a new representation election. 29 C.F.R. § 101.18.

As the Board has recognized, an independent union may decide to affiliate with a national or international union for diverse reasons. *See Amoco III*, 239 N.L.R.B. at 1195. These include access to an enhanced financial base, greater bargaining expertise, and increased bargaining strength. In the past, an independent union wishing to affiliate would first hold an election among its union's constitution and bylaws. If the members voted to affiliate, the union would then petition the Board to amend the union's certification to designate the newly-affiliated union as the exclusive bargaining representative of the unit under § 9(a). In the

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[5] For example, the Board may be satisfied after a board-supervised election or after the employer's voluntary acceptance of authorization cards in favor of the union signed by a majority of the unit's employees.

absence of a "question concerning representation," the Board would amend the certification. *See* 29 C.F.R. § 102.60(b).

Before altering its position in *Amoco IV*, the Board adhered to the following procedure to determine if a "question concerning representation" had arisen. The Board first inquired into whether the affiliation decision was made with sufficient "due process" to ensure that, as a threshold matter, the decision reflected the wishes of the union's members. The Board inquired into whether the affiliation election was "conducted under democratic procedures," with sufficient due process to guarantee that the "election represents the majority view of the *members of the union*." *NLRB* v. *Newspapers, Inc.*, 515 F.2d 334, 339 (5th Cir. 1975) (emphasis added). The election procedures must not be so "lax" or "substantially irregular" as to "negate the validity of the election." *NLRB* v. *Commercial Letter, Inc.*, 496 F.2d 35, 42 (8th Cir. 1974); *see also NLRB* v. *Bear Archery*, 587 F.2d 812 (6th Cir.1977) (enforcement of continuity finding denied because of inadequate due process in election procedures). The due process inquiry has always been used to protect union members' rights in the affiliation decision process.[6]

Once assured that the rights of union members had not been violated, *see, e.g.*, *Amoco III*, 239 N.L.R.B. at 1196, the Board conducted an investigation into whether "continuity of representation" existed between the pre- and post-affiliation union. The continuity inquiry addressed both union members' and non-union members' interests in continued representation by the representative that had been selected by the majority. The Board's inquiry thus focused on whether the union

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[6] This is the stage where the Board's new rule would have its impact. The procedural difference between the old and the new rule is the requirement of a unit-wide vote as part of the threshold due process inquiry. *See infra* p. 23.

was substantially changed by the affiliation. In the words of the classic formulation of the essential inquiry:

> [T]he right of a successor union to assume the status of a certified bargaining agent held by its predecessor depends on a factual issue—is the new union a continuation of the old union under a new name or affiliation or is it a substantially different organization?

Carpinteria Lemon Association v. *NLRB*, 240 F.2d 554, 557 (9th Cir.1956).[7]

In making its continuity determination, the Board considered such factors as continuation of unit autonomy, retention of local officers, and continuation of established union procedures (such as grievance procedures, voting procedures, and bylaws). *Compare Retail Store Employees Union Local 428* v. *NLRB*, 528 F.2d 1225, 1228 (9th Cir. 1975) (continuity not found where pre-affiliation union officers no longer participated in actual negotiations over collective bargaining issues with management after affiliation) with *Carpinteria Lemon*, 240 F.2d at 557 (continuity found where only name change occurred), and *Hamilton Tool Co.*, 190 N.L.R.B. 571, 575 (1971) (continuity found where bank accounts, checkoff authorizations, and membership remained the same). So long as continuity existed, the Board considered affiliation decisions as internal union

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[7] For an early discussion of the continuity principle, see *NLRB* v. *Harris-Woodson Co.*, 170 F.2d 720 (4th Cir. 1950). Board decisions on this subject include *Jasper Seating Co.*, 231 N.L.R.B. 171 (1977); *Bear Archery, Div. of Victor Comptometer Corp.*, 223 N.L.R.B. 1169 (1976), *enforcement denied*, 587 F.2d 812 (6th Cir. 1977); *Hamilton Tool Co.*, 190 N.L.R.B. 571 (1971); *North Elec. Co.*, 165 N.L.R.B. 88 (1967); and *East Ohio Gas Co.*, 140 N.L.R.B. 1269 (1963).

matters that did not necessarily affect the status of the union as the exclusive bargaining representative of its unit.[8]

Thus, the purpose of the due process determination was to protect union members' interests while the purpose of the continuity determination was to protect employees' § 7 and § 9(a) rights by enabling the Board to call a new representation election whenever the affiliation posed a "question concerning representation." Until now, the Board believed that a continuity determination was sufficient to protect employees' § 7 and § 9(a) rights because that process allowed the Board to require a vote, on a case-by-case basis, whenever the Board questioned whether a union's affiliation implicated those rights. When no question regarding due process or representation arose, the Board certified the newly-affiliated union and thus avoided unnecessary interference in a fundamentally internal union matter. Now, however, the Board implies that the continuity determination is inadequate to protect employees' § 7 and § 9(a) rights and that both the due process and continuity inquiries must focus on those rights.

B. Analysis: Why the New Rule Must be Rejected

After considering this matter thoroughly, we have concluded that the Board's new rule is irrational and inconsistent with the National Labor Relations Act. At least three reasons compel our conclusion. First, the rule is inconsistent with the longstanding federal labor policy, repeatedly recognized by the Supreme Court, to avoid unnecessary interference in internal union affairs. Second, the rule is inconsistent with the NLRA's pri-

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[8] There has been a continuing discussion within the Board, however, about whether affiliation decisions are internal union matters. See *Amoco III*, *Amoco IV*, *Jasper Seating Co.*, 231 N.L.R.B. 171 (1977), and *North Electric Co.*, 165 N.L.R.B. 88 (1967), for examples of cases with both majority and dissenting views on this point.

mary purpose of promoting industrial peace. Third, the rule is irrational because the Board's existing due process and continuity determination procedures adequately protect employee rights without imposing on union members' rights or otherwise being inconsistent with the NLRA.

1. *The Rule is Inconsistent with the Policy of Non-interference in Internal Union Matters*

The Board's new rule violates the longstanding federal labor policy of avoiding unnecessary interference in internal union affairs.[9] The Supreme Court has repeat-

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[9] Although the Board's earlier cases characterize affiliation decisions as internal union matters, the Board now suggests that an affiliation by its very nature always implicates employees' § 7 right to choose their bargaining representative. And, becuase § 9(a) of the NLRA requires that the exclusive bargaining representative of a unit must be chosen by a majority of the employees in the unit, the Board now suggests that *any* affiliation constitutes a sufficient change in the character of the union to call the initial employee choice of bargaining representative into question. The Board's new position is essentially that affiliations are never simply internal union affairs.

The union, on the other hand, argues that affiliation decisions are entirely internal union matters. The union asserts that federal labor policy precludes Board interference in such decisions. *See infra* pp. 12-16 & note 15.

As a practical matter, we believe that affiliation decisions are internal union matters that may in some cases have sufficient external ramifications to call non-union members' § 7 and § 9(a) rights into question. Many affiliation decisions work minimal changes; for example, the decision may involve only a name change. *See, e.g., Carpinteria Lemon Ass'n* v. *NLRB*, 240 F.3d 554, 557 (9th Cir. 1957) (continuity found where only name change occurred). We cannot see how such a change could be anything other than an internal union affair. Some affiliation decisions may have a significant external impact on the § 7 and § 9(a) rights of all employees in the bargaining unit, as, for example, when the local relinquishes its power to call a strike to the international or when the local authorizes the international to select local officers. *See, e.g., Retail Store Employees Local 428* v. *NLRB*, 528 F.2d 1225, 1228 (9th Cir. 1975) (continuity not found where pre-affiliation union officers

edly recognized this policy. *See, e.g.*, *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967); *see also NLRB* v. *Boeing Co.*, 412 U.S. 67 (1973) (Board interference with union rule held unjustified); *Scofield* v. *NLRB*, 394 U.S. 423 (1969) (same); *cf. United Steelworkers* v. *Sadlowski*, 457 U.S. 102 (1982) (union rule upheld against challenge by employees). These cases convince us that we should reject the Board's rule because it interferes with the conduct of internal union affairs without any countervailing justification.

NLRB v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), provides perhaps the strongest statement of congressional intent to limit unnecessary interference in internal union affairs. In upholding a union rule that imposed sanctions on union members who crossed a picket line during a strike, the Court explained the structure of the NLRA, and how its majority rule concept is applied:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the indi-

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no longer negotiated collective bargaining matters with management: "This leadership change suggests an absence of continuity where it counts, in a bargaining relationship.").

Even when the affiliation decision results in substantial change in the union, the actual decision to affiliate is internal, but the decision's external ramifications could justify the Board's refusal to amend the union's certification. We therefore accept the union's characterization of all affiliation decisions as internal union affairs, and emphasize that the Board is not justified in interfering with such affairs. The Board can justify its interference only *after* the Board has conducted a continuity determination and finds that a "question concerning representation" exists. The Board's proper function is to decide the matter on a case-by-case basis. *See infra* p. 16 & note 12.

> vidual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.... The employee may disagree with many of the union decisions but is bound by them. "*The majority-rule concept is today unquestionably at the center of our federal labor policy.*" "The complete satisfaction of all who are represented is hardly to be expected...."

388 U.S. at 180 (footnotes and citations omitted) (emphasis added). In keeping with this policy, "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents...." *Id.*

In explaining that an element of the "majority rule concept" reserves union decision-making to union members, the Court added that "*nonunion employees have no voice in the affairs of the union.*" 388 U.S. at 191 (emphasis added).[10] The affairs of the union are those that relate to the union's self-governance. Congress intended to restrict union self-governance only in very narrow circumstances not present in this case. "Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status." 388 U.S. 195. "[A]

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[10] The *Amoco IV* dissent emphasizes one reason why affiliation decisions are internal union affairs:

> Any tension between the right of members of the unit to a voice in their representation and the right of members of a union to decide for themselves the future of their union must be resolved in favor of the union membership. It is the union member who is most affected by union affiliation. In contrast, the effect of affiliation of the unit member who has elected not to join the labor organization which represents him is indirect.

Amoco IV, 262 N.L.R.B. at 1242. The dissent also aptly points out that non-union members interested in an affiliation decision are free to join the union. *Id.*

union could fine a member [for breaking a union rule] but that same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority...." *Scofield* v. *NLRB*, 394 U.S. at 428; *see also United Steelworkers* v. *Sadlowski*, 457 U.S. at 115-19 (discussing congressional intent to limit interference in union self-governance). In *Allis-Chalmers*, the Court further examined the legislative history of the NLRA and found that Congress had repeatedly condemned outside interference in internal union affairs. *See, e.g.*, 388 U.S. at 187-95.

The non-interference policy extends to interference by the Board. When a union rule has not clearly violated a policy of the NLRA, the Court has limited the Board's power to interfere in internal union affairs. *See Scofield* v. *NLRB*, 394 U.S. at 432 (upholding union rule, enforceable by fines and expulsion, imposing limitation on immediate pay that members could receive for piecework because Court found no "impairment of statutory labor policy"); *NLRB* v. *Boeing*, 412 U.S. at 74-75 (upholding position that Board lacked power to review reasonableness of union disciplinary rule imposed on members who crossed picket line). Thus, the Court will not allow the board to interfere with a union rule unless the rule significantly impinges on a policy of the NLRA.

Congress' concern for insulating internal union affairs from unnecessary interference is also found in the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. §§ 401-531 (1982). The entire focus of the Landrum-Griffin Act is on internal union affairs, with the object of preventing abuses of power as well as racketeering in union management. *See* 29 U.S.C. § 401.[11] In *United Steelwork-*

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[11] See *Silkwood* v. *Kerr-McGee Corp.*, ___ U.S. ___, 104 S.Ct. 615, 622-26 (1984) and *Chevron U.S.A., Inc.* v. *Hammond*, 726 F.2d 483, 489-95 (9th Cir. 1984), for examples of the examination

ers v. *Sadlowski*, 457 U.S. 102 (1982), the Supreme Court explained:

> Additional evidence that Congress regarded the union's desire to maintain control over its own affairs as legitimate is provided by the history of other sections of the [Landrum-Griffin Act]. In drafting Titles II through VI, Congress was guided by the general principle that unions should be left free to "operate their own affairs, as far as possible." S. Rep. No. 1684, 85th Cong., 2d Sess. 4-5 (1958). It believed that only essential standards should be imposed by legislation, and that in establishing those standards, great care should be taken not to undermine union self-government.... Congress' desire to permit unions to regulate their own affairs and to minimize governmental intervention suggests that it would have endorsed union efforts to reduce outsider influence.

457 U.S. at 117 (some citations omitted). In *Sadlowski*, the Court upheld a challenged union rule that prohibited non-union members and non-employees from contributing to union election campaigns because the rule served "a legitimate purpose that is clearly protected under the statute" even though the rule may have impinged on employee rights to free speech guaranteed by § 101(a)(2) of the Landrum-Griffin Act. 29 U.S.C. § 411(a)(2). *See* 457 U.S. at 115.

At a minimum, these cases demonstrate that the policy of non-interference in internal union affairs occupies an important position in the scheme of our national labor laws. Bearing this in mind, we must find that the Board's new rule is inconsistent with the NLRA because the rule interferes in an internal union decision without sufficient justification. Like the union rules in the cases discussed above in which the Court barred

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of the legislative history of one act to ascertain congressional intent in another act in the same statutory scheme.

Board interference, the affiliation decision process is an internal union matter. And, like the Court in those cases, we find that the union practice—limiting affiliation decisions to union members—does not impair a statutory labor policy.

The new rule, on the other hand, will result in interference in internal union affairs by non-members, employers (through refusals to bargain), and the Board. The new rule mandates that a continuity determination may not be conducted until after a unit-wide vote is taken. *See Amoco IV*, 262 N.L.R.B. at 1241 n.7. This puts the cart before the horse. Only *after* the Board conducts a continuity determination and finds a "question concerning representation" can the Board justify its intervention.[12] Under the new rule, by requiring a unit-wide vote even when continuity exists between a pre- and post-affiliation union, the Board inevitably interferes in internal union affairs without justification. In those cases, no "impairment of a statutory labor policy" (here the protection of employees' § 7 and § 9(a) rights) can justify the Board's intervention. *See Scofield* v. *NLRB*, 394 U.S. at 432.

2. *The New rule is Inconsistent with the Policy of Promoting Stability in the Bargaining Representative*

The Board's new rule is also inconsistent with the strong national policy of maintaining stability in the bargaining representative to achieve the NLRA's primary purpose—preserving industrial peace. 29 U.S.C. § 151 (1982). *See NLRB* v. *Silver Spur Casino*, 623 F.2d 571, 578 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981). In *Silver Spur* we explained:

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[12] We are not called upon to decide which changes resulting from an affiliation justify the Board in finding a "question concerning representation." Such factual decisions must be reviewed for substantial evidence on a case-by-case basis. *Retail Store Employees Local 428*, 528 F.2d at 1227.

> The most valued objective of the Act is industrial peace.... [T]he Board [has determined] that industrial peace is more likely to be achieved by maintaining continuity in the bargaining structure.... [T]he Board has favored continuity in the bargaining structure over the enhancement of employee free choice.

Id.

The policy of preserving stability in the bargaining structure even at some expense to employee free choice is manifested throughout the intricate web of rules the Board has constructed through years of overseeing national labor relations. To take just three examples, this policy is reflected in (1) employer refusal-to-bargain cases, (2) § 9(c)'s decertification procedures, and (3) the contract-bar rule.

First, in employer refusal-to-bargain cases, unions are accorded several presumptions of majority status. After initial certification by the Board, a union enjoys an irrebuttable presumption of majority status for one year, and a rebuttable presumption thereafter, even in the absence of a contract. *Brooks* v. *NLRB*, 348 U.S. 96 (1954); *Pioneer Inn Associates* v. *NLRB*, 578 F.2d 835, 838 (9th Cir. 1978); *NLRB* v. *Top Manufacturing Co.*, 594 F.2d 223, 224 (9th Cir. 1979). To rebut the presumption, an employer must demonstrate a good faith belief that a certified union lacks majority status. *See Silver Spur*, 623 F.2d at 578-79; *Pioneer Inn*, 578 F.2d at 839-41; *see also NLRB* v. *Tahoe Nugget, Inc.*, 584 F.2d 293, 301-02 (9th Cir. 1978) ("[T]he threat to industrial peace must be counter-balanced by good cause."). This is not an easy showing for an employer to make. *See* 1 C. Morris, *The Developing Labor Law* 540-49 (2d ed. 1983). The presumptions restrict the opportunities to challenge a certified bargaining representative's majority status.

Second, under its decertification procedures, the Board will consider decertification only if a sizable

percentage—30%—of the employees present a petition, 29 C.F.R. § 101.18, or in "extreme cases," R. Gorman, *Labor Law—Basic Text* 49-50 (1976) ("extreme cases" occur when a union has been discriminating on the basis of race or any other impermissible basis). Decertification requires a strong showing of employee dissatisfaction or other "extreme" justification. In this case, the Board's new rule effectively decertifies the newly-affiliated union before any inquiry is conducted into the character of the union or its support among employees. This result runs completely counter to the policy of promoting stability in the bargaining representative.

Third, under the contract-bar rule,

> the Board refuses to conduct decertification elections—whether requested by the employer, employees, or another union—during the life of the contract. *Hexton Furniture Co.*, 111 NLRB 342, 344 (1955). The rule was adopted to protect the bargaining atmosphere, *id.*, and is applied *even if a majority of the employees withdraw their support.*

Pioneer Inn, 578 F.2d at 838 (emphasis added). To "protect the bargaining atmosphere," the contract-bar rule limits the occasions when the Board will consider challenges to a certified bargaining representative's majority status. The Board here, as was true of the employer in *Pioneer Inn*, "does not seek a decertification election, [the Board] seeks the same result by professing a doubt of majority status" without complying with the strict requirements for decertification. *Id.*

The Board's new approach seriously undermines the stability objectives protected by the contract-bar rule. For example, in the *Amoco* cases, the employer unilaterally cancelled the current contract when notified that the bargaining representative had affiliated with another union despite the fact that the contract did not expire for another 17 months. *See Amoco Production Co.* v. *NLRB*, 613 F.2d at 109. The employer argued

that it need not recognize the contract nor bargain with the newly-affiliated union until a new unit-wide representation election was held. Although the Board has repeatedly and properly found such conduct to violate the NLRA, *see Amoco Production Co.*, 220 N.L.R.B. 861, 865 (1975); 233 N.L.R.B. 158, 161-62 (1977); and 239 N.L.R.B. 1195 (1979) (*Amoco III*), this unlawful conduct is condoned under the Board's new rule. *Amoco IV*, 262 N.L.R.B. 1240 (1982).

These rules illustrate that the Board cannot interfere with the certified bargaining representative's status without just cause. Congress and the Board have determined as a matter of national labor policy that bargaining stability and the principle of majority rule may limit the timing of employee challenges to their certified bargaining representative's majority status. Because it effectively decertifies a union before the Board can establish any basis for a union's loss of majority status, the new rule is inconsistent with this national labor policy.

3. ***In Light of Effective Longstanding Procedures, it is Irrational to Adopt the New Rule.***

The Board's rule is irrational for at least two reasons.[13] First, the rule is unnecessary to protect legitimate employee interests because the existing due process and continuity procedures adequately protect those interests. Second, the Board's reasoning does not support the rule.

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[13] For additional criticism along these lines, see Hale *Union Affiliations: Examination of the Governing NLRA Standards*, 3 Det. C.L. Rev. 709, 732-37 (1983). Hale argues convincingly that the Board's rule is not based on any statutory authority and that it will lead to temporary denials of representation in some cases where a majority of all unit employees unquestionably desire affiliation.

(a) *Existing procedures adequately protect employee interests and are consistent with federal labor policy.*

The Board's previously-followed due process and continuity determination procedures adequately protected the critical rights of employees to be represented by a union selected by a majority of employees in the unit while also protecting union members' rights to run their internal affairs free from unnecessary outside intervention. The procedure allowed the Board to require a post-affiliation representation election on a case-by-case basis if a "question concerning representation" arose. Where no question arose because the affiliation resulted in an insubstantial change in the certified bargaining representative, the Board recognized the change as a purely internal union matter and amended the certification of the newly-affiliated union without a unit-wide election. It is irrational to discard an effective procedure that neither (1) unnecessarily interferes in internal union affairs, (2) unnecessarily destabilizes the bargaining representative, nor (3) unnecessarily discourages the legitimate decision of independent unions to affiliate, in favor of a new procedure that presents all of those risks.

Moreover, we have previously recognized that the existence of adequate safeguards to protect employees' § 7 and § 9(a) rights obviates the need for alternate protective actions. For example, in *Silver Spur*, the employer refused to bargain with the certified bargaining representative and claimed that the union no longer enjoyed majority status. In rejecting the employer's claim that the refusal to bargain was in the interest of protecting employees' § 7 and § 9(a) rights, we noted that if a majority of employees in a bargaining unit no longer supported the union, they could seek the union's decertification. 623 F.2d at 578.[14] Here, the

[14] *See supra* pp. 7-8.

Board's continuity determination protects employees' § 7 and § 9(a) rights, and the employees' right to petition for decertification remains an additional and viable option for employees genuinely disgruntled by a union's affiliation decision.

(b) *The Board's Opinion Does Not Justify its Rule.*

The Board's opinion asserts that the new rule is needed to preserve "fundamental due process rights" for all employees. 265 N.L.R.B. No. 55, slip op. at p. 3. We must assume that the Board also bases its changed rule on a concern for employees' § 7 and § 9(a) rights. The Board's reasoning is flawed on both of these grounds; we have already demonstrated the error in the Board's reliance on the latter ground.

The Board's opinion specifically casts the new rule as a modification of the Board's traditional "due process" inquiry.[15] This approach is unpersuasive. The "due process" inquiry has always been aimed at assuring that democratic voting *procedures* are observed in affiliation elections to protect union members' rights to manage their internal affairs and to be represented by the organization of their choice. *See NLRB* v. *Newspapers, Inc.*, 515 F.2d 334, 339 (5th Cir. 1975) ("principle question is whether in fact the election represents the majority view of the members of the union"). For example, the Board has required the use of secret ballots to avoid any possibility of coercion. By placing the new rule in the context of the "due process" inquiry, the Board avoids considering its legitimate and appropriate inquiry: does the affiliation decision harm nonmembers' § 7 and § 9(a) interests?

As a practical matter, applying the new rule at the "due process" inquiry stage of the Board's certification

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[15] *See supra* pp. 8-9 and note 6. The union contends that there is no rational basis at all for any "due process" inquiry by the Board. We disagree. With regard to the "due process" inquiry, we hold only the unit-wide vote is not an appropriate part of that inquiry.

amendment procedure makes little sense. The Board's new rule makes the required unit-wide vote a prerequisite for the Board's conducting a continuity determination. The new rule's insertion of a unit-wide vote at this stage of the affiliation process results in duplicative procedures. Under the Board's new rule, a union would first put the affiliation question to a unit-wide vote of union and non-union employees. If the unit voted affirmatively, the union members could then vote to affiliate. Once the union voted to affiliate and asked the Board to amend the union's certification, the Board would still step in and conduct a continuity determination. Despite the fact that a majority of the unit, union and non-union employees combined, had already voted affirmatively on the affiliation question, the Board would nonetheless call a formal unit-wide representation election if the Board found that the post-affiliation union was substantially different from the pre-affiliation union. Despite the Board's protestation at oral argument that the two unit-wide votes would differ in their formality, we believe that the process is unreasonably duplicative.

The Board also states that a pre-affiliation unit-wide vote is essential to maintain the integrity of the Board's certification and election procedures. This assertion is also unpersuasive. Its earlier continuity determination process allowed the Board to call for a Board-supervised election whenever the Board found a "question concerning representation." The Board's new rule merely requires an informal, non-Board-supervised election in pre-affiliation decisions. We fail to see how imposing a non-Board-supervised election, even when no representation question arises, enhances the integrity of the Board's certification and election procedures.[16]

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[16] The Board, in its brief, also seeks to support its decision by arguing that the union in this case was substantially changed by its

CONCLUSION

The Board's new rule is inconsistent with federal labor policy because it unnecessarily interferes with internal union affairs and bargaining structure stability. Such interference is irrational because the Board's prior case-by-case approach adequately protects employees' § 7 and § 9(a) rights without such interference. The Board's new rule is therefore neither consistent with the NLRA's purposes nor rational.

Accordingly, we GRANT the union's petition for review and REMAND the matter to the Board for further proceedings consistent with this opinion.

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affiliation. The Board appears to be supporting its new rule, at least in part, by arguing that continuity might not be found in this case anyway. As the U.S. Chamber of Commerce's amicus brief cogently explains, however, the Board's opinion involves no factual analysis and treats the issue exclusively as a matter of law. We must therefore review the decision as a matter of law. *See supra* note 4.

In any event, the facts of this case could not justify the Board's new rule because the rule would also apply to situations in which 90% of the unit employees are union members and all of them vote for affiliation.

WRIGHT, *Circuit Judge*, dissenting:

The National Labor Relations Board has decided that a union affiliation election does not satisfy the requirements of due process if nonmembers are ineligible to vote. *Amoco Production Co.*, 262 N.L.R.B. 1240 (1982). I do not find that position irrational or inconsistent with the National Labor Relations Act, 29 U.S.C. §§ 151-169, and would affirm. *See Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 501 (1978).

The Fifth Circuit has enforced the Board's rule. *Local No. 4-14, Oil, Chemical & Atomic Workers International Union* v. *NLRB*, 721 F.2d 150 (5th Cir. 1983). It identifies "the crux of the Board's reasoning":

> "If the Board is to accept privately conducted elections as a basis for amending Board Certifications, it should be certain that minimal standards of due process be observed lest the very validity of Board certifications and elections be undermined. Granted that employees in a bargaining unit cannot be compelled to vote, they can, at the very least, be afforded *the opportunity to vote*. It appears basic to the collective-bargaining process that the selection of a bargaining representative be made by the employees in the bargaining unit. In our view, therefore, a cardinal prerequisite to any change in designation of the bargaining representative is *that all employees* in the bargaining unit be afforded the opportunity to participate in such selection."

Id. at 152 n.2 (quoting *Amoco Production*, 262 N.L.R.B. at 1241 (quoting *North Electric Co.*, 165 N.L.R.B. 942, 944 (1967) (dissent))).

The Fifth Circuit noted that "[s]trong arguments" for the contrary rule "were adopted by the Board in its earlier rulings that were overruled" by the new ruling. *Id.* at 152. It concluded that "Although the Board earlier vacilated [sic] somewhat in establishing a rule . . . , [it] clearly articulated reasonable grounds for this later change." *Id.*

The court stated:

> [W]e are unable to say that the general ruling that now requires the participation of nonunion members in an affiliation election is irrational or inconsistent with the Act, or that it is beyond the wide discretion of the Board to establish procedures in an affiliation election that will ensure the fair and free choice of the bargaining representative of all the employees.

Local Union No. 4-14, 721 F.2d at 152-53. I agree. That one circuit already has concluded that the Board's position is rational reinforces my position. An intercircuit conflict over the rationality of the Board's decision is unwarranted.

The majority explains at length its reasons for reaching the opposite conclusion. It engages in the balancing of interests that is the province of the Board, not the courts.

First, does the new rule unnecessarily interfere with internal union affairs? The Board has concluded that an affiliation election is not an internal union affair, but involves the selection of a bargaining representative. *Amoco Production*, 262 N.L.R.B. at 1241. While the Board has presumed in the past that an affiliation election was an internal union affair unless a question concerning continuity of representation arose, it may change its application of the Act "in light of its cumulative experience." *Beth Israel Hospital*, 437 U.S. at 508.

The Board has concluded that affiliation election voting rights for nonmembers are necessary to preserve their right to participate in the selection of a bargaining representative. *See* 29 U.S.C. § 157. The bargaining unit here consists of about 4800 employees, of which 2824 are union members. Only 1206 member employees voted for affiliation; 774 voted against it.

The majority opinion concludes that requiring participation of nonmembers constitutes an unwarranted interference with internal union affairs. While the majority may give the preservation of union autonomy higher priority, we are required to defer to the Board's exper-

tise. *See NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404, 405 (1962); *Texaco, Inc.* v. *NLRB*, 700 F.2d 1039, 1042-43 (5th cir. 1983). The Board need only justify its position within the statutory framework. *Beth Israel Hospital*, 437 U.S. at 501; *Local Union No. 4-14*, 721 F.2d at 152.

Second, is the Board's rule inconsistent with the promotion of stability in the bargaining representative? The majority opinion states that this is a situation in which the promotion of stability of the bargaining repesentative should prevail over individual employees' rights to free choice. A change of affiliation is a change in the status of the bargaining representative. Under the new rule, nonmembers may not force affiliation because the decision to hold an affiliation election remains the province of the union. The Board's rule will promote stability more effectively than did its former position.

Third, is the Board's new rule irrational? The majority contends that irrationality is established by the adequacy of the old procedure and the inadequacy of the Board's reasoning.

The adequacy of the old procedure is irrelevant. We should instead determine whether the new rule is rational and consistent with the Act. The merit or sufficiency of the previous rule should not control.

The majority lists risks that it considers created unnecessarily by the change in procedure. I would defer to the Board's conclusions as to the necessity of the new rule. Those risks each identify a policy, the protection of which is discussed elsewhere in this opinion.

The Board has not avoided the appropriate statutory inquiry. It has decided that the right of nonmembers to select their bargaining representative will be protected adequately only if they may participate in affiliation decisions. Therefore, due process fairness and the integrity of the certification process require the right to participate in affiliation elections.

I would affirm.

APPENDIX B

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 19—AC—23

SEATTLE-FIRST NATIONAL BANK, EMPLOYER

and

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY RETAIL CLERKS INTERNATIONAL UNION, AFL—CIO, PETITIONER

[Filed Apr. 5, 1979]

DECISION AND AMENDMENT OF CERTIFICATION

On November 30, 1970, the Board in Cases 19-RM-816 and 19-RC-5301, certified the Firstbank Independent Employees Association (herein FIEA or Petitioner) as the collective-bargaining representative in an appropriate unit of all the Employer's employees within the State of Washington, excluding professional employees, confidential employees, management trainees, and supervisors and guards as defined in the Act. On June 19, 1978, the Petitioner filed this petition to amend the certification to change the name of the certified bargaining agent from "Firstbank Independent Employees Association" to "Financial Institution Employees of America, Local 1182, chartered by Retail Clerks International Union, AFL—CIO."

A hearing was held on the petition on July 26 and 27, 1978, before Hearing Officer Lynne C. Litwiller at Seattle, Washington. All parties appeared at the hearing and were given full opportunity to participate therein. After the hearing, the Petitioner and the Employer filed briefs with the Regional Director. There-

after, the Regional Director transferred the case to the Board for decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The rulings of the Hearing Officer are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board finds:[1]

FIEA has had a collective-bargaining agreement with the Employer since 1971. The current collective-bargaining agreement was terminated by the Employer on October 30, 1977.

During 1977, the executive council of FIEA authorized its bargaining committee to explore affiliation with other unions. The committee, after contacting several unions, voted unanimously to seek affiliation with the Retail Clerks International Union. The affiliation agreement was unanimously approved by the executive council of FIEA. A notice was mailed to all unit representatives (the equivalent of shop stewards) informing them of meetings to be held throughout the State on January 6, 7, and 8, 1978.[2] At these meetings the unit representatives were informed of the terms of affilia-

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[1] The Petitioner filed a brief, differing slightly from that filed with the Regional Director, with the Board. The Employer has moved to strike this brief as not being in compliance with Sec. 102.67(i) of the Board's Rules and Regulations, Series 8, as amended. We agree and grant the Employer's motion to strike. The Petitioner has moved to consolidate this case with Cases 19—CA—9835 and 10—CA—9916 also issued this day at 241 NLRB No. 117. The Employer filed a memorandum in opposition. We find that the cases are not similar enough in law or fact to warrant consolidation and the Petitioner's motion is hereby denied. The Employer has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] Hereinafter all dates 1978.

tion, the election procedure, and the standards for voter eligibility. In order to vote an individual had to be either a current member of FIEA or join by January 19 and pay 1 month's dues of $4. The unit representatives were instructed to contact all unit employees and inform them of the pending affiliation vote and specifically to contact nonmembers and explain to them the eligibility standards. Concurrently a letter was sent to all unit employees informing them of the pending election and the eligibility requirements. After this initial meeting other meetings were held at all work locations. These meetings were attended by officials of both FIEA and Clerks and were open to all unit employees. On or about January 17 another letter was sent to all unit employees reiterating the eligibility standards.

On January 20 a notice was sent to all FIEA members informing them that a secret-ballot, affiliation election would be conducted by the Washington State Public Employment Relations Commission (PERC). The ballots were to be mailed by February 5 and had to be back to PERC by February 21. The notice stated the ballot question and contained additional information regarding the locations of meetings being held throughout the State on February 4 and 5.These meetings were again attended by representatives of both Unions who spoke about the affiliation and answered any questions. Two other information letters were sent to FIEA members before the meetings.

PERC mailed the ballots on February 4 to 2,624 members; there were approximately 4,800 employees in the unit. The results were 1,206 votes for affiliation and 774 against. FIEA applied for, and on April 1 was granted, a charter by the Clerks.

The Employer attacks the affiliation on the grounds that: (1) the substitution of the Petitioner for FIEA is a substantial change in the bargaining representative and thus raises a "question concerning representation" re-

quiring a Board-conducted election; (2) only members of FIEA were allowed to vote; (3) FIEA did not follow its own constitution in establishing voter eligibility standards.

This case is controlled by our recent Second Supplemental Decision in *Amoco Production Company*.[3] Regarding the Employer's first argument, as we said in *Amoco* (*Id.* sl. op., at p. 2.):

> [a]n affiliation does not create a new organization, nor does it result in the dissolution of an already existing organization. The organizations participating in the affiliation determine whether any administrative or organizational changes are necessary in the affiliating organization.[4]

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[4] Only union members will be affected by any change in the constitution and internal union rules and regulations, as they have voluntarily agreed to do by virtue of the majority within their ranks having chosen to affiliate.

Similary the Employer's second argument is also lacking in merit.

> Since we view an affiliation vote as basically concerned with the organization and structure of the union and not the representational status of employees, it is the sort of internal union matter into which the Board does not ordinarily intrude. The board determines whether the vote was conducted with adequate due process: including, for example, proper notice to all members, an orderly vote, and some reasonable precautions to maintain the secrecy of the ballot.[4]

The Employer is not contending that there was any irregularity or impropriety in PERC's administration of the election and it is readily apparent from the facts

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[3] 239 NLRB No. 182 (1979). Member Truesdale concurring, Members Jenkins and Penello dissenting separately.

[4] *Id.*, sl. op., pp. 3—4.

that "(a)dequate notice, discussion and time for reflection were provided all members before the election."[5]

The Employer argues that the election was deficient because the voter eligibility requirements were not in accordance with the FIEA constitutional requirements that only members in good standing as of the last day of the month preceding the notice of election shall be allowed to vote; here December 30. But FIEA permitted members to vote who were on the last dues-checkoff list submitted by the Employer for October 1977 as well as employees joining as late as January 19.

The Petitioner contends that its actions were reasonable in the circumstances. The Petitioner alleges that the Employer put it in this dilemma by terminating dues checkoff. The Petitioner was consequently faced with the difficult, if not impossible, task of determining who, in this sizable unit spread over the State of Washington in approximately 171 locations, was a current dues-paying member. It therefore decided that anyone who joined and paid a month's dues before January 19 would be eligible to vote. The Petitioner also argues that its conduct was intended to, and in fact did, enfranchise [unit] members. Moreover, the Petitioner submits there is no evidence that FIEA's actions were intended to undermine, or resulted in the undermining of, the electral process.

We agree with the Petitioner. In the circumstances the broadening of the franchise does not support denial of the petition under our decision in *Amoco*, *supra*. We therefore find that the Employer's arguments are without merit.

In view of the foregoing, we shall amend the certification in Cases 19—RM—816 and 19—RC—5301 to reflect the current name and affiliation of the certified

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[5] *Id.*, sl. op., p. 5.

union. This amendment is not to be considered as a new certification or recertification.

ORDER

It is hereby ordered that the petition to amend the certification filed by the Financial Institution Employees of America, Local 1182, chartered by Retail Clerks International Union, AFL—CIO, be, and it hereby is, granted, and that the Decision and Certification of Representative in Cases 19—PM—816 and 19—RC—5301 be amended by substituting "Financial Institution Employees of America, Local 1182, chartered by Retail Clerks International Union, AFL—CIO" for "Firstbank Independent Employees Association."

Dated, Washington, D.C. April 5, 1979

/s/ _____

JOHN H. FANNING,
Chairman

/s/ _____

BETTY SOUTHARD MURPHY,
Member

/s/ _____

JOHN C. TRUESDALE,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 19-AC-23

SEATTLE-FIRST NATIONAL BANK, EMPLOYER

and

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY RETAIL CLERKS INTERNATIONAL UNION, AFL-CIO, PETITIONER

[Filed Aug. 1, 1979]

ORDER CORRECTING

On April 5, 1979, the National Labor Relations Board issued a Decision and Amendment of Certification in the above-entitled proceeding[1] in which an inadvertent error appears.

IT IS HEREBY ORDERED that said Decision be, and it hereby is, corrected by striking the words "union members" from the last line of the last paragraph on page 5 [reprinted *supra*, App., 31a] and substituting therefor "unit members".

IT IS FURTHER ORDERED that the Decision and Amendment of Certification, as printed, shall appear as hereby corrected.

Dated, Washington, D.C., August 1, 1979.

By direction of the Board:

/s/ _____
ROBERT VOLGER
Deputy Executive Secretary

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[1] 241 NLRB No. 116.

APPENDIX C

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 19—CA—11364

SEATTLE-FIRST NATIONAL BANK

and

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL—CIO[1]

[Filed Sept. 28, 1979]

DECISION AND ORDER

Upon a charge filed on May 8, 1979, by Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL—CIO, herein called the Union, and duly served on Seattle-First National Bank, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 19, issued a complaint and notice of hearing on May 21, 1979, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of

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[1] The General Counsel moved to amend the name of the Charging Party. Financial Institution Employees of America, Local No. 1182, Chartered by Retail Clerks International Union, AFL—CIO, to reflect the current name of the International Union. We hereby grant that motion.

the charge, complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on April 5, 1979, following a hearing in Case 19—AC—23, the Board issued its Decision and Amendment of Certification (241 NLRB No. 116), amending the certification in Cases 19—RM—816 and 19—RC—5301 by substituting "Financial Institution Employees of America, Local No. 1182, chartered by Retail Clerks International Union, AFL—CIO," for "Firstbank Independent Employees Association," herein FIEA, as the certified bargaining representative of the employees of the Respondent in the unit found appropriate in Cases 19—RM—816 and 19—RC—5301,[2] and that commencing on or about April 5, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On May 31, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint. It also filed an application for *subpoena duces tecum*. The Union filed a response to that application. Thereafter, the Union filed a motion for an appropriate remedy and Respondent filed a response.

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[2] Official notice is taken of the records in the representation and amendment of certification proceedings. Cases 19—RM—816, 19—RC—5301 and 19—AC—23, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F. Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

On June 12, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on June 19, 1979, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

RULING ON THE MOTION FOR SUMMARY JUDGMENT

In its answers to the notice and the complaint Respondent, in effect, is attempting to relitigate the issues raised in the amendment of certification proceeding. However, Respondent also argues that it has new evidence showing *inter alia*, that officers of FIEA have been replaced; that statements made by the Union before the affiliation vote have proved unfounded or inaccurate; and that it has possession of numerous petitions from employees indicating that they disagree with the way the affiliation vote was conducted. Respondent, therefore, contends that if the complaint is not dismissed it should be granted a hearing.[3] We reject this contention. In *Amoco*, *supra*, the Board held that a union affiliation proceeding was essentially an internal union matter in which the Board will generally not in-

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[3] Respondent also argues that the Board Decision in *Amoco Production Company*, 239 NLRB No. 182 (1979) (Member Truesdale concurring, Members Jenkins and Penello dissenting separately), should not be applied retroactively. However, Respondent has failed to demonstrate how the application of *Amoco*, *supra*, would be an unjust burden on Respondent.

volve itself. Under *Amoco* the alleged new evidence, even if adduced and credited, would have no effect on the validity of the affiliation vote. We therefore find Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[4]

FINDINGS OF FACT

I. The Business of Respondent

Respondent is a banking association with an office and place of business in Seattle, Washington, where it is engaged in commercial banking and services. During the past 12 months, a representative period, Respondent has provided services valued in exceess of $50,000 directly to customers outside the State of Washington.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL—CIO, is a labor organization within the meaning of Section 2(5) of the Act.

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[4] The Union's motion for attorney's fees and other expenses, however, is hereby denied because we cannot conclude that Respondent's defense was "patently frivolous." *Beck's Inc.*, 215 NLRB 765 (1974).

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The Unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees employed by Respondent in the State of Washington, excluding officers, management trainees, professional employees, confidential employees, and supervisors and guards as defined in the Act.

2. The certification

On April 5, 1979, the Board amended the certification in Case 19—AC—23 to substitute the Union for FIEA as the bargaining representative of the employees in said unit for the purpose of collective bargaining with Respondent. Since April 5, 1979, the Union has been and continues to be the exclusive representative of the employees in said unit within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about April 5, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about April 5, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since April 5, 1979, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate

unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practice Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Seattle-First National Bank, State of Washington, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL—CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by Respondent in the State of Washington, excluding officers, management trainees, professional employees, confidential employees, and supervisors and guards as defined in the Act,

constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 30, 1970, the above-named labor organization as amended on April 5, 1979, has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 5, 1979, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Seattle-First National Bank, State of Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, and other terms and conditions of employment with Financial Institution Employees of America, Local No. 1182, chartered by United Food

and Commercial Workers International Union, AFL—CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees employed by Respondent in the State of Washington, excluding officers, management trainees, professional employees, confidential employees, and supervisors and guards as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its various locations where bargaining unit employees are employed copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted.

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[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. September 28, 1979

JOHN H. FANNING,
Chairman

/s/ _____
BETTY SOUTHARD MURPHY,
Member

_____
JOHN C. TRUESDALE,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL—CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees employed by the Employer in the State of Washington, excluding officers, management trainees, professional employees, confidential employees, and supervisors and guards as defined in the Act.

SEATTLE-FIRST NATIONAL BANK
(Employer)

Date _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 2948, 915 Second Avenue, Seattle, Washington 98174, Telephone 206—442—7472.

APPENDIX D

Cases 19-CA-11364 and 19-AC-23

Seattle-First National Bank *and* Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO.

Nov. 18, 1982

SUPPLEMENTAL DECISION AND ORDER

On September 28, 1979, the National Labor Relations Board issued its Decision and Order in Case 19-CA-11364[1] finding that the Respondent had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to recognize and bargain with Financial Institution Employees of America, Local No. 1182, after it had affiliated with United Food and Commercial Workers International Union, AFL-CIO,[2] and changed its name from Firstbank Independent Employees Association (herein FIEA) to Financial Institution Employees of America, Local No. 1182.[3] The Respondent was ordered to recognize and bargain with

[1] 245 NLRB 700.

[2] Initially, the Local affiliated with Retail Clerks International Union, AFL-CIO. Thereafter, the International merged with Amalgamated Meat Cutters and Butcher Workmen of North America. AFL-CIO, creating the United Food and Commercial Workers. In Case 19-CA-11364 the Board amended the name of the Charging Party. 245 NLRB 700 at fn. 1.

[3] As a result of its affiliation FIEA petitioned the Board to amend its certification. The petition was granted and an Amendment of Certification was issued at 241 NLRB 751 (1979). Thereafter, the Respondent refused to recognize and bargain with the affiliated Union. Accordingly, because of the relationship between Case 19-CA-11364 and Case 19-AC-23 the Board has decided, *sua sponte*, to consolidate them.

the newly affiliated Union. On June 27, 1980, the United States Court of Appeals for the Ninth Circuit granted the Board's motion to withdraw the record on review, and the parties were notified on October 30, 1980, that the Board had decided, *sua sponte*, to reconsider its decision and that statements of position could be submitted. The Board received timely statements of position from the Charging Party and the Respondent.

The Board has reconsidered its decision in light of the entire record and the statements of position and, for the reasons set forth herein, has decided to dismiss the complaint in Case 19-CA-11364 in its entirety, and to dismiss the petition and revoke the amended certification in Case 19-AC-23.

The facts have been fully set forth in the Board's Decision and Amendment of Certification, 241 NLRB 751. Briefly summarized they are as follows: FIEA was certified by the Board on November 30, 1970. The parties entered into their initial collective-bargaining agreement in 1971. The most recent collective-bargaining agreement was terminated by the Respondent in 1977.

In 1977 the executive council of FIEA unanimously agreed to seek affiliation with the Retail Clerks. Meetings were held, which were open to all unit members, throughout the State of Washington. At these meetings the affiliation was discussed along with voter eligibility requirements. Eligible to vote were current FIEA members and those who joined by January 19, 1978. In addition to the meetings, letters were sent to all unit members explaining, *inter alia*, the eligibility requirements. Thereafter, the Washington State Public Employment Relations Commission conducted a secret ballot election. Ballots were mailed to 2,624 union members; there were approximately 4,800 employees in the unit. Of the union members, 1,206 voted for affiliation and 774 against. On April 1, 1978, FIEA was granted a charter by the Retail Clerks.

The Respondent argues, *inter alia*, that the affiliation election is invalid because only members of FIEA were permitted to vote. In accordance with our recent decision in *Amoco Production Company*,[4] this contention is correct. The issue in *Amoco*, as here, was the validity of a "members only" affiliation vote. The Board held that an affiliation vote in which nonmembers are not permitted to vote violates fundamental due-process standards.

In this case nonmembers were not permitted to vote in the affiliation election. Accordingly, the election did not meet minimal due-process standards and the affiliation was improper. The Respondent, therefore, did not violate Section 8(a)(5) of the Act when it refused to bargain with Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that its Decision and Order in Case 19-CA-11364 (245 NLRB 700) be vacated and the complaint be, and it hereby is, dismissed in its entirety.

IT IS FURTHER ORDERED that the Board's Decision and Amendment of Certification issued in Case 19-AC-23 (241 NLRB 751) be, and it hereby is, vacated.

IT IS FURTHER ORDERED that the petition in Case 19-AC-23 be, and it hereby is, dismissed.

MEMBERS FANNING and ZIMMERMAN, dissenting:

An affiliation election is nothing more than an internal union matter upon which the Board generally will not intrude. For this reason, and as more fully set forth in our dissenting opinion in *Amoco Production Com-*

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[4] 262 NLRB 1240 (1982) (Members Fanning and Zimmerman dissenting).

pany,[5] we would find that the affiliation election conducted herein fully met adequate due-process requirements and reaffirm the original decisions.

[5] 262 NLRB 1240 (1982).

APPENDIX E

Case 23-CA-5285

Amoco Production Company *and* Local Union No. 4-14, Oil Chemical and Atomic Workers International Union, AFL-CIO.

July 23, 1982

THIRD SUPPLEMENTAL DECISION AND ORDER

On September 29, 1975, the National Labor Relations Board issued its Decision and Order[1] in the above-entitled proceeding finding that the Respondent had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to bargain and by repudiating its collective-bargaining agreement with the Union after it affiliated with Oil, Chemical and Atomic Workers Union, AFL-CIO (OCAW), and changed its name from "National Oil Workers Union Local 14" to "Local 4-14, OCAW." In a Supplemental Decision and Order[2] issued on November 1, 1977, the Respondent was ordered to reimburse the Union for the dues it failed to withhold and remit as required by the collective-bargaining agreement. On June 22, 1978, the United States Court of Appeals for the Fifth Circuit granted the Board's motion to withdraw the record on review, and the parties were notified on July 3, 1978, that the board had decided *sua sponte* to reconsider its decision and that statements of position could be submitted. The Board received timely statements of position from the Charging Party and the Respondent. Thereafter, on January 3, 1979, the Board issued a Second Supplemental Decision and Order[3] in which it reaf-

[1] 220 NLRB 861 (herein *Amoco I*) (Member Jenkins dissenting).

[2] 233 NLRB 158 (herein *Amoco II*).

[3] 239 NLRB 1195 (herein *Amoco III*) (Member Jenkins dissenting).

firmed its Supplemental Decision and Order and found, *inter alia*, that the issue of union affiliation was an internal matter with which the Board will generally not involve itself.

On March 7, 1980, the United States Court of Appeals for the Fifth Circuit denied enforcement of the Board's Order and remanded the case to the Board to make a factual determination as to whether Local 4-14, OCAW, was a successor to NOWU, Local 14.[4] Thereafter, the Board received statements of position from the parties.

The Board has reconsidered its decision in light of the entire record and the statements of position and, for the reasons set forth herein, has decided to dismiss the complaint in its entirety.

The basic facts are not in dispute and have been fully set forth in *Amoco I*, *supra*. Briefly stated they are as follows: NOWU was certified by the Board in 1963.[5] the parties entered into their initial collective-bargaining agreement in 1965. During 1972 elections were conducted by NOWU regarding affiliation with OCAW. Both proposals were defeated and NOWU remained an independent unaffiliated union.

In 1974 NOWU's board of directors unanimously agreed that another affiliation election be conducted as soon as possible. Nine meetings were held to discuss the question of affiliating with OCAW. Notices were posted on various bulletin boards stating the reason for the meetings and the fact that they were open to both members and nonmembers. A representative of OCAW was present to answer questions. Those who attended the meeting were informed that in order to vote they

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[4] 613 F.2d 107.

[5] The name of the Union when certified was Independent Oil Workers Union, Local 14. However, after the certification the Union changed its name to NOWU, Local 14. This change was reflected in the parties' collective-bargaining agreement.

must become members of the Union and that this could be accomplished by signing a dues-authorization form. This was in accordance with NOWU's bylaws. Thereafter, ballots were mailed to 382 members who were on a current checkoff list maintained by the Respondent. There were 480 employees in the unit. Included with the ballot was a postage-paid envelope addressed to a post office box rented especially for the election. The results were 214 in favor of affiliation and 71 against.

In July 1974, NOWU notified the Respondent of its affiliation and that it intended to continue its relationship with the Respondent but that it would now be known as Local 4-14, OCAW. The Respondent replied by sending a letter to each member of the bargaining unit stating, *inter alia*, that the collective-bargaining agreement between the Respondent and NOWU was void. Upon a charge filed by OCAW the General Counsel issued a complaint alleging that the Respondent violated Section 8(a)(5) of the Act.

A hearing was held before an Administrative Law Judge who found that the Respondent had violated Section 8(a)(5) of the Act. This decision was adopted by the Board, Member Jenkins dissenting. (See *Amoco I*, *supra*.) The rationale for that decision was articulated in *Amoco III*, *supra*, Member Jenkins dissenting. The Board held that an affiliation vote was nothing more than an internal union matter with which the Board does not ordinarily intrude and, notwithstanding the fact that only members were allowed to vote, that the affiliation was valid.

The Fifth Circuit Court of Appeals remanded the case to the Board to make a factual determination regarding whether OCAW was a successor to NOWU.[6] In so doing, the court did not pass on the validity of the affiliation election. However, the issue[s] of the validity

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[6] 613 F.2d at 112.

of a "members only" affiliation vote is a threshold question here for, if the affiliation election were improper, the question of successorship would be moot. For the reasons that follow, we now find that the affiliation vote held in this case was invalid because nonmembers were not permitted to vote, in violation of fundamental due process standards.[7]

Initially, we note that the Board has consistently held that, while affiliation elections need not meet the standards the Board has enunciated for its own election proceedings, there are certain due process requirements which must be met in order to have a valid affiliation election.[8] The issue before us is whether or not the fact that nonmembers are ineligible to vote satisfies adequate due process standards. We find that it does not.

As Members Jenkins and Zagoria stated in their dissent in *North Electric Company*,[9] a position which later became the basis for the Board's decision in *Jasper Seating Company, Inc.*:[10]

> If the board is to accept privately conducted elections as a basis for amending Board certifications, it should be certain that minimal standards of due process be observed lest the very validity of Board certifications and elections be undermined. Granted that employees in a bargaining unit cannot be compelled to vote, they can, at the very least,

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[7] Although this case was remanded on the "successor" issue, we do not believe we are foreclosed from considering the validity of the affiliation vote. The facts and positions of the parties on the issue are fully before us. See fns. 1, 2, and 3, above. Therefore, in reaching our decision in this case, we find it unnecessary to pass on the "successorship" issue.

[8] *Bear Archery, Division of Victor Comptometer Corporation*, 223 NLRB 1169 (1976).

[9] 165 NLRB 942, 944 (1967).

[10] 231 NLRB 1025, 1026 (1977) (then Chairman Fanning dissenting).

> be afforded *the opportunity to vote*. It appears basic to the collective-bargaining process that the selection of a bargaining representative be made by the employees in the bargaining unit. In our view, therefore, a cardinal prerequisite to any change in designation of the bargaining representative is *that all employees* in the bargaining unit be afforded the opportunity to participate in such selection.

To contend, as do our dissenting colleagues, that a union affiliation vote is an internal union matter into which the Board does not ordinarily intrude is inconsistent with their own position. If, in fact, union affiliations are internal union matters why does the Board even look to see if adequate due process has been achieved? The obvious answer to that question is that once either party raises the question of affiliation, either by an amendment to certification proceeding or, as here, as a defense to an 8(a)(5) charge, it is incumbent upon the Board, before it places its imprimatur on an affiliation election, to assure that that election meets adequate due process standards.

Additionally, it is inconsistent to permit all unit employees to vote in a representation election but, when the question is one of affiliation with another union, to permit only union members the right to vote. The question of affiliation is distinguishable from those situations cited by the dissent. Unlike strike votes, contract ratification votes, etc., which the dissent would equate with affiliation votes, only the latter directly impacts upon matters within the breadth of the Act and results in an undermining of the Board's own election and certification procedures. As even the Board majority in *Amoco III* concluded, affiliation votes affect the interests of all employees. To argue that all unit members were afforded an opportunity to join the Union and thus participate in the election is to shut one's eyes to Section 7 of the Act. Section 7 clearly gives employees the choice of participating in union activities or to refrain from en-

gaging in those activities. The dissent gives mere lip service to Section 7 and relegates the phrase "adequate due process" to mere verbiage.[11]

Accordingly, we find that, in order to provide adequate due process safeguards in an affiliation election, all unit employees, whether union members or not, must be permitted to participate and vote in an affiliation election. Because, in this case, all unit members have not been accorded those rights we find that the affiliation was improper and therefore the Respondent did not violate Section 8(a)(5) of the Act when it refused to bargain and repudiated the collective-bargaining agreement.[12]

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[11] Additionally, we note that our dissenting colleagues stress that their concept of due process includes the requirement that nonmembers be permitted to join the union prior to any affiliation vote, and thus participate in that vote. However, shortly after the Board's decision in *Amoco III* was issued, a Board majority which included one of our dissenting colleagues placed its imprimatur on a privately conducted affiliation vote in which nonmembers *were* foreclosed from participation by the union's imposition of an election eligibility date which had already passed. *Providence Medical Center*, 243 NLRB 714 (1979) (Member Jenkins and then Member Penello dissenting in relevant part). As pointed out in Member Jenkins' dissent in *Providence*, in the past varying Board majorities utilized various rationales and erected different standards in deciding each affiliation case before them. Indeed, the only consistency in past cases has been the ultimate result upholding the "members only" elections. The dissent would continue this course by upholding the affiliation vote in the instant case. This we are unwilling to join.

[12] The dissent makes much of the fact that even if the disenfranchised employees were permitted to vote they could not have affected the outcome. Our Decision today is to insure adequate due process in all affiliation votes. As Member Jenkins stated in response to this same argument in *Amoco I*, *supra*, "the effects of the exclusion cannot be measured by a mere numerical tally."

The dissent accuses us of depriving employees of their freely chosen representative and denying them the fruits of collective bargaining. With all due respect, however, we believe that it is

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

MEMBERS FANNING and ZIMMERMAN, dissenting:

For the reasons set forth in the majority opinion in *Amoco III*,[13] we would find that the affiliation election conducted here met adequate due process requirements, and accordingly would find that the Respondent violated the Act by refusing to bargain with the lawful representative of its employees.

The majority position is nothing more than an adoption of the dissent in *North Electric Company*.[14] The Board wisely rejected that view in that case and again 4 years later, in *The Hamilton Tool Company*,[15] where the Board stated:

> As the subject voted upon involved an internal union matter relating to the affiliation of the incumbent union rather than to the employee selection of a bargaining representative, the preclusion of nonmembers from voting did not affect the regularity of the election. As the Board has observed under similar circumstances, when "adequate opportunity to vote is provided to all those . . . eligi-

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the dissent which would deprive *employees* of the benefits guaranteed by the Act. By permitting the exclusion of nonmembers from affiliation elections, the dissent would ignore the wishes of all employees and permit only union members to impose their wishes on all employees, even where only a minority of the employee complement are union members. As we stated in *Quemetco, Inc.*, 226 NLRB 1398, 1399 (1976), it is the *employees'* freedom to select a bargaining representative which is of paramount importance under the Act.

[13] 239 NLRB 1195 (1979).

[14] 165 NLRB 942 (1967).

[15] 190 NLRB 571 (1971).

> ble to vote, the decision of the majority actually voting is binding on all."[16]

This principle, that the Board generally will not intrude into internal union affairs, has been supported numerous times by the Supreme Court.[17] Indeed, in *Scofield* the Court made it clear that the Board has no authority to involve itself in internal union rules unless "the rule invades or frustrates an overriding policy of the labor laws."[18] Notwithstanding this clear statement of the law, the majority, under the guise of "due process," finds that an internal union rule which sets forth a basic criterion for voting, i.e., membership, voids an otherwise valid affiliation election.

The contention that all unit employees must be permitted to vote in an affiliation election because of its incidental impact on all unit employees is a *non sequitur*. As the Board stated in *Amoco III*:

> That the option to participate in an affiliation election is not accorded to nonmembers differs little from their exclusion from other internal matters, including strike votes and contract ratification votes, and the selection of officers, stewards, and negotiators.[19]

Certainly those recognized internal union matters, especially contract ratification—the very terms of a collective-bargaining agreement under which both member and nonmember employees must work—have as much, if not more, impact on nonmembers as an affiliation.

Nor does the rule infringe on any Section 7 right. If an employee wishes to participate in union affairs, he is

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[16] *Id.* at 574.

[17] See *N.L.R.B.* v. *Boeing Co.*, 412 U.S. 67 (1973); *Scofield* v. *N.L.R.B.*, 394 U.S. 423 (1969); *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967).

[18] *Id.* at 429.

[19] 239 NLRB 1195 at fn. 1.

free to join and to vote.[20] If he has not joined, and was not unfairly barred from doing so, he is responsible for his own disenfranchisement. Having engaged in conduct which plainly proclaims his lack of interest in the union's internal affairs, it is neither surprising nor unfair that the union has taken his actions at face value. And it is no more surprising, and no more unfair, when the union does not solicit his views concerning its internal affairs.

Any tension between the right of members of the unit to a voice in their representation and the right of members of a union to decide for themselves the future of their union must be resolved in favor of the union membership. It is the union member who is most affected by union affiliation. In contrast, the effect of affiliation on the unit member who has elected not to join the labor organization which represents him is indirect. Nor is that unit member foreclosed from participation in a valid affiliation process should he feel vitally concerned; for, if he has not been given fair opportunity to join the union and to participate in its affairs, due process has not been satisfied. Lacking due process, we would not recognize the affiliation.

The majority does nothing more—and nothing less—than deprive employees of their freely chosen

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[20] The majority misstates our position regarding due process. We do not hold, nor did the *Amoco III* majority, *supra*, that due process requires that nonmembers be allowed to join in time to vote in a particular affiliation election. It only requires that they be permitted to "become members and participate under normal union rules." *Id.* Had the affiliation election date or membership rules in *Providence Medical Center*, 243 NLRB 714 (1979), been manipulated to foreclose participation by nonmembers, Member Fanning would not have accepted the result. Here, of course, nonmembers had full opportunity to join the Union before the affiliation vote. Thus, Member Fanning's position in *Amoco III* and *Providence* is entirely consistent.

representative and denies to them the fruits of collective bargaining which the Act was designed to guarantee.[21] We dissent.

[21] Here, even if all unit members had been permitted to vote, and had done so against affiliation, the outcome of the election would have been unchanged.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-7736

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

and

SEATTLE-FIRST NATIONAL BANK, INTERVENOR.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

[Filed Aug. 2, 1984]

JUDGMENT

The Cause came on to be heard on the Transcript of the Record from the National Labor Relations Board and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Petition for Review in this cause be and hereby is GRANTED and REMANDED to the Board for further proceedings.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-7736

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

[Filed Dec. 26, 1984]

ORDER DENYING PETITION FOR REHEARING AND REJECTION SUGGESTION FOR REHEARING EN BANC

Before: WRIGHT, PREGERSON, and FERGUSON, *Circuit Judges*.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Hon. Robert R. Beezer did not participate in the consideration of this matter.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

KENNEDY, *Circuit Judge*, with whom SNEED, ANDERSON, and HALL, *Circuit Judges*, join, dissenting from denial of rehearing en banc:

I dissent from the court's failure to hear this case en banc and to consider the conflict we create with the Fifth Circuit on an important issue of labor law. *See Local Union No. 4-14* v. *NLRB*, 721 F.2d 150 (5th Cir. 1983).

Quite apart from the labor law question presented, the panel opinion is disturbing for a misapplication of a fundamental legal category, the concept of reason. Since the writings of Cicero, if not before, it has been recognized that the fair application of law to a particular dispute, as well as the underlying theory of justice in a more universal sense, depends on reason. Cicero, *De Legibus* Book II (C.W. Keyes trans. 1977). Reason is a juridical concept essential for the constancy of our decisions, and we undermine it if we use the term "irrational" to express disagreement with a proposition supported by articulated premises within the boundaries of tenable argument.

We must uphold a Board rule unless it lacks rationality or is inconsistent with the statute. *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 501 (1978); *NLRB* v. *Nevis Industries, Inc.*, 647 F.2d 905, 909 (9th Cir. 1981). It is no accident that rationality is the standard used to scan the authority of the Board to adopt its rules. The deferential standard of review is a recognition of the Board's central function in the legal process. The Board faces difficult choices and may make close, even debatable, decisions regarding the implementation of national labor policy. Its rulemaking power is an ongoing process in which the Board is free to change its position, guided by the experiences it has gained in the administration of the Act. *Beth Israel Hospital*, 437 U.S. at 508.

Here the board was required to implement the basic policy of free choice of all employees in the selection of a bargaining representative, as provided by sections 7 and 9(a) of the National Labor Relations Act. 29 U.S.C. §§ 157, 159(a) (1982). The Board saw the question to be not whether the union could change its affiliation, but whether it could change its affiliation *and* remain the bargaining agent of all the employees in the unit. It concluded that all affected employees, not merely union members, must be permitted a vote on the proposed change. The argument the union makes that this is a matter of internal union concern is respectable, but its rejection was not irrational. Neither the Board in announcing the rule nor the Fifth Circuit in sustaining it acted outside the bounds of reason.

Upon these considerations and those further expressed by Judge Wright in his dissenting opinion, I dissent from the failure of the court to hear the case en banc.

NORRIS, *Circuit Judge*, with whom POOLE and HALL, *Circuit Judges*, join, dissenting from denial of rehearing en banc:

I also dissent from the court's failure to take this case en banc. I simply cannot accept the panel's judgment that the NLRB rule at issue represents "an unreasonable or unprincipled construction of the statute...." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1978). Given the wide latitude we must accord the NLRB 's exercise of its rulemaking authority, I agree with the Fifth Circuit that the rule falls within the bounds of NLRB discretion. *Local Union No. 4-14* v. *N.L.R.B.*, 721 F.2d 150 (5th Cir. 1983). In my view, en banc review is justified because the panel decision creates an unnecessary conflict in the circuits.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-7736

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL NO. 1182, ETC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

[Filed Jan. 2, 1985]

ORDER

Before: WRIGHT, PREGERSON and FERGUSON, *Circuit Judges*.

The order filed December 26, 1984 is amended. The second paragraph should read: The full court has been advised of the en banc suggestion and an active judge requested a vote on it. The request having failed to receive a majority of the votes of the active judges, the petition for hearing is denied and the suggestion for rehearing en banc is rejected.

The last sentence of the December 26 order is deleted.

APPENDIX H

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, provide in pertinent part as follows:

§ 7, 29 U.S.C. 157.

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing, ... and shall also have the right to refrain from any or all of such activities....

§ 8(a), 29 U.S.C. 158(a).

> It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

§ 9, 29 U.S.C. 159.

> (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment....
>
> * * * * *
>
> (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
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> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert

that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.... [Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto.] If the Board finds upon the record of such hearing that such question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.